

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SHAWN D. BUNTING,	§	
	§	No. 224, 2005
Defendant Below,	§	
Appellant,	§	Court Below: Superior Court of the
	§	State of Delaware in and for
v.	§	New Castle County
	§	
STATE OF DELAWARE,	§	No. 0407024013
	§	
Plaintiff Below,	§	
Appellee.	§	

Submitted : June 21, 2006
Decided : September 7, 2006

Before **STEELE**, Chief Justice, **HOLLAND**, **BERGER**, **JACOBS**, and **RIDGELY**, Justices, constituting the Court *en Banc*.

ORDER

This 7th day of September 2006, upon consideration of the briefs of the parties and their contentions at oral argument, it appears to the Court that:

(1) Defendant-Appellant Shawn Bunting appeals his conviction of various drug crimes in the Superior Court.¹ Bunting argues that he was deprived of a fair trial when one witness referred to evidence that had been found by a

¹ Possession With Intent To Deliver A Non-Narcotic Schedule I Controlled Substance, Use of A Vehicle For Keeping Controlled Substances, Use of A Dwelling For Keeping Controlled Substances, Possession of Drug Paraphernalia, and Driving While License Is Suspended And/Or Revoked in violation of 16 Del. C. § 4752, 16 Del. C. § 4755(a)(5), 16 Del. C. § 4771, and 21 Del. C. § 2756(a). While initially indicted on an additional count of Possession of a Narcotic Schedule II Controlled Substance, in violation of 16 Del. C. § 4753, the jury acquitted Defendant of this charge.

probation officer and where another witness, who was identified as a law enforcement officer, testified she had visited his home three times a month over a nine month period. Bunting also argues that the Superior Court erred by denying his motion to suppress evidence seized during a warrantless search of his home. We find no reversible error and affirm.

(2) On July 28, 2004, Bunting's probation officer saw him driving a motor vehicle. The officer confirmed that Bunting was operating the vehicle without a license, and contacted her supervisor for approval to stop Bunting. Once that approval was given, the probation officer arranged for the State Police to do so. Incident to Bunting's arrest, the State Police searched his vehicle and discovered sixteen bags of marijuana with a total weight of 13.5 grams. The probation officer then contacted the Governor's Task Force² regarding an administrative search of Bunting's residence.

(3) Probation Officer Mark Lewis was assigned to the Governor's Task Force. Lewis asked for and received permission from his supervisor at Probation and Parole to search Bunting's home. Probation officers then searched Bunting's home, with the State Police being present for security purposes and to receive any evidence of a crime. During the search of Bunting's home, the officers located

² The Governor's Task Force consists of officers from Probation and Parole, as well as members of the State Police, and is designed to provide assistance to probation officers by conducting investigations to ensure probationer compliance with laws and technical conditions of probation.

another 113.5 grams of marijuana and 1.7 grams of cocaine in a room used by Bunting.

(4) Prior to trial, Bunting moved to exclude any reference to his probationary status. The trial judge stated:

I agree that we should avoid mention of the fact that the defendant is on probation, because I don't think that it's probative of the case. I would also ask the State to instruct their Probation and Parole witnesses to not wear any clothing that has the word "Probation & Parole" on it.

In furtherance of that ruling, the trial judge also instructed the State to instruct any Probation officers to testify that they are "law enforcement officers." The State urged reconsideration of that instruction, but the trial judge reiterated that the State was precluded from presenting evidence on Bunting's probationary status.

(5) During the trial one of the officers was identified as a probation officer. Another probation officer testified about how many times she had been at Bunting's home to show a basis for her knowledge that the room where the drugs were found was Bunting's. When this probation officer testified, she was identified as a law enforcement officer consistent with the trial judge's instruction. Defense counsel moved for a mistrial on each of these occasions, and each motion was denied. Regarding the home visits, the trial judge gave a curative instruction that the jury was to disregard the testimony about home visits.

(6) In *Pena v. State*, this Court set forth the governing standard in reviewing denials of motions for mistrial:

A trial judge sits in the best position to determine the prejudicial effect of an unsolicited response by a witness on the jury. We review the denial of a motion for mistrial after an *unsolicited response* by a witness for abuse of discretion or the denial of a substantial right of the complaining party. In doing so, we consider (1) the nature and frequency of the conduct or comments, (2) the likelihood of resulting prejudice, (3) the closeness of the case and (4) the sufficiency of the trial judge's efforts to mitigate any prejudice in determining whether a witness's conduct was so prejudicial as to warrant a mistrial.³

(7) Defendant first claims that the Superior Court abused its discretion when it refused to grant a mistrial after the following exchange occurred between the State and Detective Stout:

Q. Do you know who found that one additional smaller bag?

A. I believe it was Mark Lewis, Probation & Parole.

[Prosecutor]: Your Honor, may we approach

[Prosecutor]: That was very low, but I think I heard Probation & Parole come in there.

THE COURT: I did not hear it.

[DEFENSE COUNSEL]: Yeah. I ask for a mistrial, Your Honor. A curative instruction would only enhance the – it wouldn't cure it.⁴

³ *Pena v. State*, 856 A.2d 548, 550-551 (Del. 2004) (footnotes and citations omitted) (emphasis and enumeration added). *See also Taylor v. State*, 827 A.2d 24, 27 (Del. 2003).

⁴ A89.

The trial judge denied the motion for mistrial and declined to give a curative instruction, since “that brings more attention than this matter deserves.”⁵ The trial judge also ruled:

At this point, I’m not going to grant a mistrial at this point. I barely heard it. It is part of the record, but I don’t think that the fact that Mr. Lewis has been identified in that way, in a very fleeting manner, has in any way identified the defendant as being on probation at the time the offense was committed.⁶

(8) Applying *Pena*, we hold that the Superior Court did not abuse its discretion in denying Bunting’s first motion for a mistrial. The trial judge specifically noted that the statement was barely audible and that its “fleeting” nature did not identify Bunting as being on probation. Although the trial judge did not issue a curative instruction to mitigate whatever prejudice might have arisen, defense counsel did not request one for tactical reasons. On the facts of this case, the trial judge properly exercised her discretion in choosing not to draw attention to the barely audible statement.

(9) Bunting next claims that the trial judge abused her discretion in refusing to grant a second motion for a mistrial after the following exchange occurred between the State and Probation Officer Uniatowski:

Q. Were you at his [Defendant’s] residence between October of 2003 and June 17th of 2004?
A. Yes, I was.

⁵ *Id.*

⁶ *Id.*

Q. Do you know how many times that you would had been there between that time frame?

A. Total times?

Q. Yes.

A. Well, I would average about three times a month. So how many months?

Mr. Bartley [Defense Counsel]: Your Honor, may we approach sidebar?

Defense counsel again moved for a mistrial. Prior to the exchange the prosecutor asked the trial judge if she could ask the witness whether she had gone to the house between certain dates. The trial judge permitted the witness to say “I am familiar with the defendant and I have been to his residence,” but the judge precluded testimony on “how many times she’s been to the house and reasons for her familiarity” unless the defense raised that as an issue. The trial judge also told the prosecutor that “you may lead her with regard to the general time period.” After the exchange, the trial judge held that the witness’ testimony contravened the court’s *in limine* ruling, but that the error could be corrected through a curative instruction. The trial judge then instructed the jury:

Ladies and Gentlemen, you are to disregard any statement from the witness as to how many times she has been in the defendant’s home. That is something you’re not to consider. It’s completely irrelevant the reason for which the defendant—the witness may have been in the defendant’s home; the number of times are completely irrelevant. You should disregard that testimony.⁷

⁷ A99.

(10) Bunting argues that we must review his claim under the more stringent standard applied to claims of prosecutorial misconduct. The State concedes on appeal that the testimony contradicted the trial judge's ruling. Here, a timely objection to the evidence was made. Because the issue was fairly presented and considered by the trial judge, we will review for harmless error using the analysis this court recently articulated in *Baker v. State*.⁸

(11) The first step of a *Baker* harmless error analysis of alleged prosecutorial misconduct is to determinate whether misconduct actually occurred. We have not stated an all-inclusive definition of prosecutorial misconduct. However, it is axiomatic that a lawyer may not question a witness in a manner that contravenes an express instruction of a trial judge.⁹ When a lawyer elicits testimony before the jury that contravenes an express ruling of the trial judge, that lawyer has engaged in misconduct. Here, the State concedes the question was improper, but that contends the prosecutor did not purposely contravene the trial judge instruction because of the trial judge's authorization that "you may lead the witness with regard to the general time period." Although the prosecutor's intention can be relevant to determining the consequences of particular

⁸ *Baker v. State*, __ A.2d __ (Del. 2006), Slip. Op. No. 115, 2006, Steele, C.J. (August 28, 2006).

⁹ DEL. LAWYERS' RULES OF PROF'L. CONDUCT R. 3.5(d) provides that a lawyer shall not "engage in conduct intended to disrupt a tribunal or engage in undignified or discourteous conduct that is degrading to a tribunal."

misconduct,¹⁰ it does not alter the fact that it was misconduct for the prosecutor to question a witness in a manner that the trial judge had expressly precluded.

(12) The second step of a harmless error analysis is to determine whether the prosecutorial misconduct prejudicially affected substantial rights of the defendant. “[W]e apply the three factors of *Hughes* test, which are: (1) the closeness of the case, (2) the centrality of the issue affected by the error, and (3) the steps taken to mitigate the effects of the error.”¹¹ The evidence showed that 13.5 grams of marijuana were found in Bunting’s car, and that 113.5 grams of marijuana and 1.7 grams of cocaine were found in Bunting’s home in an area he controlled. This was not a close case. The improper testimony on home visits was not a central issue and the jury was instructed to disregard it. The jury is presumed to have understood and followed the trial judge’s instructions.¹² For that reason, and because of the clear evidence of the charged drug offenses, we conclude that the improper question did not prejudicially affect Bunting’s substantial rights.

(13) The third step of the harmless error analysis under *Baker*, which is consistent with *Hunter v. State*,¹³ is to determine whether the prosecutor’s misconduct was a repetitive error that requires reversal because it casts doubt on

¹⁰ See e.g., *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982)(where governmental conduct is intended to “good” the defendant into moving for a mistrial, a retrial may be barred on double jeopardy grounds.)

¹¹ *Baker v. State*, Slip Op. at p. 17.

¹² *Fortt v. State*, 767 A.2d 799, 804 (Del. 2001); *Fuller v. State*, 860 A.2d 324, 329 (Del. 2004).

¹³ *Hunter v. State*, 815 A.2d 730 (Del. 2002).

the integrity of the judicial process.¹⁴ The prosecutor sought the guidance of the trial judge on how to proceed, and was told what the witness could say and that she could lead the witness regarding the general time period of the visits. Thus, a limited inquiry concerning the witness's visits to the residence was permitted. Defense counsel acknowledged to the trial judge his expectation that the witness would testify to being at the home three to five times. On the facts before us, we do not find a repetitive error that casts doubt on the integrity of the judicial process and therefore requires reversal. The prosecutor's inquiry, although improper, did not affect either the substantial rights of the defendant or the integrity of the judicial process. Having conducting a *Baker* analysis, we conclude that the error was harmless.

(14) Defendant's next claim on appeal is that the Superior Court erred when it denied his motion to suppress evidence seized during the warrantless administrative search of his home. Specifically, he challenges the join efforts between Probation & Parole and Law Enforcement personnel, because his probation officer (i) did not have a case conference with her supervisor, (ii) did not use a Pre-Search Checklist, (iii) did not have approval of her supervisor to search the house, and (iv) failed to obtain an administrative warrant.

¹⁴ *Id.* at 737-738.

(15) Warrantless searches of a probationer's residence that are conducted pursuant to state law and satisfy the Fourth Amendment's reasonableness requirement are valid under the U.S. Constitution.¹⁵

11 Del. C. § 4321(d) states:

Probation and parole officers shall exercise the same powers as constables under the laws of this State and may conduct searches of individuals under probation and parole supervision *in accordance with Department procedures* while in the performance of the lawful duties of their employment and shall execute lawful orders, warrants and other process as directed to the officer by any court, judge or Board of Parole of this State; however, a probation and parole officer shall only have such power and duties if the officer participates in and/or meets the minimum requirements of such training and education deemed necessary by the Department and Board of Examiners. (emphasis added).

(16) Bunting claims that the probation officers did not comply with departmental guidelines required by the statute, and therefore, the search was invalid. The Superior Court found the search to be consistent with Section 4321 and denied the motion to suppress.

(17) “This Court reviews the trial court’s denial of a motion to suppress, after an evidentiary hearing, under an abuse of discretion standard.”¹⁶ When a

¹⁵ *Griffin v. Wisconsin*, 483 U.S. 868, 872-80 (1987).

¹⁶ *McAllister*, 807 A.2d at 1122-23 (citations omitted).

warrantless search is involved, the State bears the burden of proof on a motion to suppress evidence seized as a result of the challenged search and seizure.¹⁷

In *Fuller v. State*, we held that:

The purpose of the regulations is to ensure that the Department has sufficient grounds before undertaking a search. The individual procedures advance that goal but are not independently necessary, as demonstrated by the fact that the regulations explicitly state exceptions for when the search checklist need not be used.

Even if the officers did not follow each technical requirement of the search regulations before searching Fuller, they did satisfy those that affect the reasonableness inquiry under the United States and Delaware Constitutions.¹⁸

(18) In both *Fuller* and the present case, the probation officer contacted a supervisor who approved the search. In *Fuller*, “the officers failed to follow search regulations because they did not use the search checklist required by the regulations or engage in a face-to-face case conference before permission to search was granted.”¹⁹ “This Court has held that administrative searches of probationer homes require only reasonable grounds, even if the probation officers do not satisfy each technical requirement of the search and seizure regulations of the Department of Correction.”²⁰ Here, there was substantial compliance with the

¹⁷ *Hunter v. State*, 783 A.2d 558, 560 (Del. 2001). See *Vale v. Louisiana*, 399 U.S. 30, 34, 26 L. Ed. 2d 409, 90 S. Ct. 1969 (1970); *Mason v. State*, 534 A.2d 242, 248 (Del. 1987) (both holding the State bears the burden of demonstrating the existence of an exception to the warrant requirement).

¹⁸ *Fuller v. State*, 844 A.2d 290, 292 (Del. 2004).

¹⁹ *Id.* at 291.

²⁰ *Donald v. State*, __A.2d __, 2006 WL 1788300 *4 (Del. 2006).

Department's search regulations and Section 4321. The probation officers discussed the factors on the checklist based upon Bunting's arrest for a new drug offense involving possession with intent to deliver the drugs while on probation for trafficking in drugs. After finding drugs packaged for sale in Bunting's car, an administrative search of his home was reasonable. The Superior Court therefore acted within its discretion when it denied Bunting's motion to suppress.

NOW, THEREFORE, IT IS ORDERED that the judgments of the Superior Court are AFFIRMED.

BY THE COURT:

/s/Henry duPont Ridgely
Justice